

No. 77-1515

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

THE LONG ISLAND RAIL ROAD COMPANY, PETITIONER

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. The court of appeals set aside an order of the Interstate Commerce Commission that approved petitioner's 12.5 percent permanent "terminal surcharge" on interstate freight originating or terminating on its rail system. The surcharge was designed to offset an increase in petitioner's federal railroad retirement taxes, pursuant to Title II of the Railroad Retirement Amendments of 1973, Pub. L. 93-69, 87 Stat. 162, which provided special rate adjustment procedures allowing carriers to recoup the additional expenses imposed by Title I of the Act.

The court of appeals held that the Commission failed adequately to articulate its reasons for approving the surcharge in accordance with the standards and limitations normally applicable to ratemaking (Pet. App. 12a-14a). The court also held that the surcharge constituted an unjustified departure from the equal-factor

basis of divisions of joint rates (Pet. App. 14a-15a), and it remanded the case to the Commission. Pending determination of final rates by the Commission on remand, the court authorized petitioner to "restore" and collect the 12.5 percent interim surcharge it had been collecting prior to the Commission's final order,¹ but the court directed that the proceeds be kept "in a separate trust fund * * * subject to further just and equitable orders of the Interstate Commerce Commission" (Pet. App. 16a). The court did not offer any reason for imposing the trust on the funds generated by the surcharge, which previously had been unencumbered.²

2. Petitioner argues that the court of appeals misconstrued the Railroad Retirement Amendments of 1973, misapplied Section 15(6) of the Interstate Commerce Act, as amended, 41 Stat. 486, 49 U.S.C. 15(6), which governs the division of joint rates, and improperly directed that the interim terminal surcharge be held in a separate trust fund.

¹The interim surcharge had been approved by a three-judge court in *Long Island Railroad v. United States*, 388 F. Supp. 943 (E.D.N.Y.). The railroad respondents argue that the 12.5 percent surcharge collected under the court of appeals' order is a new, equitable surcharge rather than the one collected under the order of the three-judge court (Br. in Opp. 15 n. 9, 28-29). But the interim surcharge approved by the three-judge court was to remain effective until a permanent surcharge was in place. Because of the decision of the court of appeals, no permanent surcharge is in place. We therefore believe that petitioner could have continued to collect the interim surcharge whether or not the court of appeals had explicitly authorized it to do so.

²On March 6, 1978, this Court stayed the court of appeals' judgment, pending the timely filing and disposition of a petition for a writ of certiorari, "only insofar as the judgment requires [petitioner] to keep in a separate trust fund the proceeds of the interim 12.5 percent terminal surcharge" (Pet. App. 1e).

a. With regard to the construction of the Railroad Retirement Amendments, the court of appeals held only that the Commission failed to explain how it made its decision under the "standards and limitations applicable to ratemaking generally under Part I" as required by Section 15a(4)(c) of the Act (Pet. App. 12a-14a). The court did not reach the railroads' argument that the Commission's decision was contrary to the standards generally applicable to ratemaking, because it concluded that the Commission had not adequately articulated the reasons for its decision. While the court might easily have concluded that the Commission's findings were adequate, the decision does not erroneously construe the Railroad Retirement Amendments.

b. Similarly, although the court held that the Commission departed from the equal-factor basis of the divisions of joint rates without justification, it stated that an "adequate justification may or may not be in the recoupment purpose of the Act of July 10, 1973" (Pet. App. 15a). The court found it unnecessary to resolve the issue because "the ICC has not yet appropriately spoken" (*ibid.*). The Commission remains free under the court of appeals' judgment to reach the same result on remand so long as it explains the reasons for its action. The court's order simply requires further explanation by the Commission; because it is thus limited, neither the Commission nor the United States concluded that it was appropriate to file a petition for a writ of certiorari. The case—at least at the present time—does not present a legal issue concerning rate divisions that requires this Court's resolution.

c. We agree with petitioner that the court of appeals erred in directing the interim terminal surcharge to be held in a separate trust fund pending determination of final rates by the Commission (Pet. App. 16a). In enacting Section 15a(4) Congress intended any interim rate

increases to remain in effect until the Commission approved the permanent increase and to be subject to refund only to the extent the interim rate exceeded the permanent rate.³ This view is supported by the three-judge court's statement that the purpose of Section 15a(4)(b) is "to assure that railroads were immediately able to recover their increased retirement benefit contributions." *Long Island Railroad v. United States*, *supra*, 388 F. Supp. at 947. The requirement of the court of appeals that the interim charges be held in escrow pending the establishment of the permanent increase therefore violates the intent of Congress. It deprives petitioner of operating revenues that both Congress and the three-judge court have concluded petitioner should receive. The court of appeals, on setting aside the Commission's order, should have restored the parties to the position they occupied before the entry of the Commission's order—in that position petitioner was entitled to collect and spend the 12.5 percent surcharge.

This question is essentially limited to the facts of this case and is thus not sufficiently important to warrant plenary review by this Court.⁴ We nevertheless believe the court of appeals' escrow requirement is plainly incorrect. Because the escrow requirement effectively places the court of appeals in conflict with the three-judge court, and

³The Conference Report on the Railroad Retirement Amendments stated that, once the Commission accepted the interim tariffs for filing, the Commission would have no authority to suspend them pending final determination. H.R. Conf. Rep. No. 93-319, 93d Cong., 1st Sess. 12 (1973).

⁴Section 15a(4) was designed to offset specific retirement tax increases imposed by the Railroad Retirement Amendments. Since the railroads' increased tax costs, except for those of petitioner, were offset some time ago, circumstances like those presented by this case are not likely to recur.

because the escrow requirement may damage the already financially precarious status of petitioner, we believe that it would be appropriate for this Court summarily to reverse the judgment of the court of appeals to this limited extent. Cf. *Ralston Purina Co. v. Louisville & Nashville Railroad Co.*, 426 U.S. 476.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed insofar as it orders petitioner to keep in a separate trust fund the proceeds of the 12.5 percent interim terminal surcharge.

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